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Dear Senator:

As the Senate begins consideration of legislation regarding the detention, treatment and trial of individuals in the custody of the United States, the American Bar Association would like to express its views on these issues.

The ABA is strongly opposed to the provision in S. 3930, the Military Commissions Act of 2006, that would strip judicial review of existing habeas corpus claims for detainees in U.S. custody. The writ of habeas corpus, which ensures protection against unjust government imprisonment, is one of the pillars of our constitutional system. It serves as an important check on the power of executive detention and embodies the fundamental principle that one should not be imprisoned by the government without opportunity for a fair and impartial determination that the detention is in accordance with the Constitution and laws of the United States.

In 2004, the U.S. Supreme Court, in *Rasul v. Bush*, ruled that federal courts have jurisdiction to consider petitions for writs of habeas corpus from Guantanamo detainees under the federal habeas statute. Furthermore, the U.S. Supreme Court held in *Hamdan v. Rumsfeld* that the framework for judicial review established by the Detainee Treatment Act did not apply to habeas corpus claims that were already pending in the U.S. courts. If adopted, this provision would reverse those decisions and would effectively wipe out a large number of pending habeas cases filed by Guantanamo detainees.

Apart from the constitutional questions raised by this provision, this result is unjust. Executive Branch officials have acknowledged that many of the 450 or so detainees now at Guantanamo the government does not intend to try before military commissions but will hold indefinitely as "enemy combatants." Sorting out such issues — deciding which governmental claims of wrongdoing have legal and factual support and which do not — is precisely the role of the courts and the core of habeas corpus.

The ABA believes these provisions may invite future abuse, since they apply to any alien (including a lawful permanent resident of the United States) being held by the government outside the country. Thus, once a non-citizen were, transported from this country to a United States facility abroad he would lose his habeas corpus rights and be relegated to the truncated review provided by the Detainee Treatment Act of 2005.

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The ABA opposes this provision and the retroactive removal of pending habeas corpus claims from the U.S. court system. We understand that Senators Arlen Specter (R-PA) and Patrick Leahy (D-VT) may offer an amendment to strike this provision from S. 3930 and we urge you to support this amendment if offered.

The ABA has additional concerns with S. 3930. Since February 2002, we have urged the President and the Congress to ensure that the rules for any military commissions be guided by the Uniform Code of Military Justice (UCMJ), to provide the rights afforded in courts-martial, and to fully comply with our international treaty obligations. As the Supreme Court found in *Hamdan v. Rumsfeld*, the prior Guantanamo military commission system was flawed and violated the UCMJ and Common Article 3 of the Geneva Conventions.

In establishing new procedures for military commissions, we encourage the Congress to rely to the greatest extent possible on the respected and tested framework of the UCMJ. Our nation has the finest military justice system in the world and the UCMJ courts-martial substantially meet the security needs that are most acute for the type of defendants likely to be apprehended abroad for terrorist activities, including the foreign-based command and control of al Qaeda.

Therefore, we are concerned about the procedures in S. 3930 that depart significantly from the tried and true procedures established in the UCMJ. Specifically, we believe that a fair process requires the opportunity for a defendant to confront the evidence presented against him and we are concerned about the treatment of hearsay evidence, as well as evidence obtained by coercion, in the commissions established by S. 3930. For example, if the legislation is adopted, the tribunals would allow for consideration of evidence obtained by coercion in some circumstances if it was obtained prior to December 30, 2005. The military rules for courts-martial are used around the world and have built into the system superior means for dealing with these very types of issues in a fair manner that also meets the security needs that accompany the trial of detainees.

We are also concerned about the inclusion of language in Section 8(a)(2) of the legislation that provides that “no foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States” in interpreting Common Article 3 violations under the War Crimes Act. The provision unnecessarily intrudes on the independence of the judiciary, a co-equal branch of government. Respect for the separation of powers suggests that Congress should refrain from telling the federal courts how they should perform their core adjudicatory functions. The appropriate use of foreign sources by our federal courts is an evolving issue, and it has wide-ranging implications with the pitfalls and advantages of consulting other legal traditions, whether our courts should engage in comparative constitutional analysis, and the impact on foreign policy of the judgments of our courts. These questions should be left open to discussion and debate so that a consensus over the relevant issues and guiding principles may emerge.

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The ABA has consistently urged the U.S. government to fully comply with the Geneva Conventions of August 12, 1949, and particularly to observe the minimum protections of Common Article 3 and related customary international law. We welcome the recent Department of Defense directive reaffirming the military's obligation to meet these minimum standards and believe that U.S. civilian agencies should be held to the same standard. As such, we have reservations about Section 8(a)(3) of the bill, which would allow the Executive Branch to define non-grave breaches of Common Article 3 by Executive Order. This provision would allow the administration to sanction civilian agencies to engage in harsh interrogation techniques that would be unacceptable for the military to conduct under U.S. law. A departure by the U.S. from a uniform approach to the treatment of detainees under Common Article 3 may affect both the treatment of Americans captured abroad and the credibility of our government in raising objections to the use of torture or other cruel, inhuman or degrading treatment or punishment against our citizens.

The United States has long served as the model for the world of a civilized society that effectively blends security and human liberty. When we refuse to observe the international standards for the treatment of detainees which we were so instrumental in developing, we provide encouragement for others around the world to do the same. Our British allies have demonstrated that those traditional principles can be adhered to without diminishing the ability to provide for the security of its citizens. We must do likewise.

The ABA believes it is essential that we establish procedures that inspire public confidence in the system and that we would find acceptable if applied to our own service members. For this reason, we urge you to support the expected Specter-Leahy Amendment to strike Section 6 stripping habeas corpus review during floor consideration of legislation authorizing the establishment of military commissions.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Karen J. Mathis". The signature is written in a cursive style with a small dot above the 'i' in Mathis.

Karen Mathis